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No. 96-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAM J. SHEPPARD,

Petitioner,

vs.

ENRIQUE J. DIAZ,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 20, 1996

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

1. Following final judgment in compliance with Fed.R.Civ.P. 23 in a federal civil rights class action under the Eighth Amendment, may court-appointed class counsel remove from state court a lawsuit by a dissatisfied class member claiming deficient representation by class counsel in the settlement of the federal case?

2. Is court-appointed class counsel subject to suit alleging deficient legal representation by a dissatisfied member of a Fed.R.Civ.P. 23 statewide class following a final judgment, entered after notice and hearing, in a federal court class action brought under the Eighth and Fourteenth Amendments?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, William J. Sheppard, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on June 25, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix 1a through 24a to this petition and is published at 85 F.3d 1502 (11th Cir. 1996). The unpublished order of the district court appears at Appendix 31a though 34a to this petition.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on June 25, 1996. A timely Petition for Rehearing was denied by the Court of Appeals on October 1, 1996, and copies of the unpublished Orders Denying Rehearing and Denying Rehearing En Banc appear at Appendix 25a through 28a to this petition. The issuance of the judgment of the court of appeals as the mandate on October 10, 1996, appears at Appendix 29a

through 30a to this petition. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

This case requires interpretation and application of 28 U.S.C. §§1441 and 1331, and of Fed.R.Civ.P. 23(d) and (e). The pertinent text of these provisions appears at Appendix 40a through 42a to this petition.

STATEMENT OF THE CASE

A. The Basis for Jurisdiction Below.

Federal jurisdiction in the district court was invoked under 28 U.S.C. §§1441 and 1331. Respondent initiated this action in the Circuit Court of the Fourth Judicial Circuit of Florida, in and for Duval County, Florida, alleging

deficiencies in the petitioner's representation of him as class counsel for all Florida state prison inmates in the settlement, under Fed.R.Civ.P. 23(d) and (e), of a federal action seeking injunctive relief for violations of rights under the Eighth and Fourteenth Amendments to the Constitution of the United States.

On its face, respondent's complaint alleged that the settlement terms violated his asserted Eighth Amendment right to at least one hour per day of out-of-cell exercise. The petitioner removed the case to the United States District Court for the Middle District of Florida on the basis that the district court had original jurisdiction under 42 U.S.C. §1983 and 28 U.S.C. §1331, because determination of respondent's claims depend necessarily on the Eighth Amendment and court-approved settlement proceedings under

Fed.R.Civ.P.23. Whether the district court had jurisdiction in the circumstances of this case is one of the questions presented in this petition.

B. The Facts Material to the Questions Presented.

On May 10, 1982, the petitioner was appointed by the United States District Court for the Middle District of Florida to serve as co-counsel for the plaintiff statewide inmate class in Celestineo and Costello v. Wainwright, Case Nos. 72-109-Civ-J-S and 72-94-Civ-J-S (M.D. Fla.)[1] (hereafter, "Costello")[2] following the death of predecessor counsel who had been

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[1] See also, Costello v. Wainwright, 430 U.S. 325 (1977) (per curiam), rev'g. 539 F.2d 547 (5th Cir. 1976) (en banc).

[2] The consolidated cases generally were known as "Costello." See, supra n.1; Diaz v. Sheppard, 85 F.3d 1502, 1503-1504 (11th Cir. 1996).

appointed by the court in 1972. Appendix at 35a-38a. See also, Celestineo v. Singletary, 147 F.R.D. 258, 259 (M.D. Fla. 1993). Diaz was a member of the plaintiff class of all Florida inmates, who in Costello challenged certain conditions of confinement of the Florida Department of Corrections under the Eighth Amendment to the United States Constitution. 147 F.R.D. at 259. Diaz was subject to "close management" confinement. Diaz v. Sheppard, 85 F.3d 1502, 1503 and n.1 (11th Cir. 1996).

During the 21-year course of the Costello litigation, which encompassed total prison conditions issues throughout Florida, see Celestineo, 147 F.R.D. at 259, 261-264, the district court ordered doctors and other experts to review certain issues in the case, including the appropriate amount of out-of-cell large

muscle exercise appropriate for inmates. Diaz, 85 F.3d at 1504. On October 9, 1992, the district court[3] entered an order giving notice to members of the plaintiff class of the proposed closure of the case based on the Special Master's[4] recommendation for entry of a final judgment in accordance with the terms outlined by the Special Master and with the agreement of the parties, and providing a period of time within which class members could file comments or objections to the Report and Recommendation. 85 F.3d at 1504; Celestineo, 147 F.R.D. at 259-260.

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[3] Hon. Susan H. Black, after her appointment to the Eleventh Circuit. Celestineo, 147 F.R.D. at 258.

[4] The late Dean Joseph R. Julin served as the district court's special master in the case. See Celestineo, 147 F.R.D. at 261.

Following receipt of 346 letters from 815 members of the class at 40 different correctional institutions, the district court held a hearing on March 5, 1993, to consider the proposed final judgment and the objections and other comments submitted by class members. Celestineo, 147 F.R.D. at 259-261. The district court found that those of the letters that could be characterized as objections were solely individual in scope, did not demonstrate constitutional inadequacies in health care delivery and did not reflect systemic non-compliance with prior settlement agreements governing overcrowding and health care delivery. Id. at 260-261. As alleged in respondent's complaint below, the respondent had written the petitioner a letter complaining that the proposed final judgment did not provide for one hour per day of outdoor exercise

and did not prevent close management inmates from being suspended from outdoor exercise privileges. Diaz, 85 F.3d at 1504.

The respondent sued the petitioner in state court in 1994, alleging that the petitioner committed legal malpractice, negligence and breach of contract by agreeing, on behalf of the plaintiff class, to the final judgment in Costello. Id. On its face, the respondent's complaint alleged that Eighth Amendment caselaw entitled him to one hour of daily outdoor exercise. Id. at 1504-1505. The petitioner removed the action to federal court and moved to dismiss the suit on the basis that the suit filed by Diaz merely constituted an untimely objection to the final judgment entered in Costello under Fed.R.Civ.P. 23, which necessarily turned

on the Eighth Amendment to the United States Constitution. Id. at 1504.

The district court denied the respondent's motion to remand the case to state court and granted the petitioner's motion to dismiss. Id. at 1504; Appendix at 31a-34a. On appeal, a divided panel of the United States Court of Appeals for the Eleventh Circuit vacated the district court's judgment, concluding that the district court lacked subject matter jurisdiction over the action, and instructed the district court to remand the case to state court. Diaz, 85 F.3d at 1506.

The dissent in the court of appeals concluded that a class member dissatisfied with the conduct of class counsel is limited as a matter of federal law either to seeking to intervene in the class action or to file a collateral suit, and

concluded that "clearly whether a class member may sue class counsel for malpractice arising out of a federal court-approved settlement is a federal question." Id. at 1507 (Logan, J., dissenting). Judge Logan further concluded that this action was both properly removed to federal court and properly dismissed by the district court. Id. at 1508. (Logan, J., dissenting).

REASONS WHY THE WRIT SHOULD BE GRANTED

Review should be granted because this Court has not resolved the important and recurring issues presented. The law of the circuits is unsettled and conflicting. The issues presented are of great importance to the conduct and settlement of class actions, the ability and willingness of attorneys to represent Fed.R.Civ.P. 23 classes, and,

particularly, the willingness of attorneys to agree to accept court appointments under 28 U.S.C. §1915(d) to represent Rule 23 classes in even the most meritorious cases initiated by unrepresented indigent parties.

Review further is warranted because the decision of the court of appeals contravenes, misreads or misapplies this Court's decisions in Oklahoma Tax Commission v. Graham, 489 U.S. 838 (1989); Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); and Gully v. First National Bank, 299 U.S. 109 (1936). Accordingly, because the issues presented are recurring, important and unsettled, and the opinion of the court of appeals conflicts with decisions of this Court, the Court's review is warranted.

This case presents a circumstance in which the court of appeals' majority mistakenly believed that removal of this case actually was predicated only on a federal law defense. Diaz v. Sheppard, 85 F.3d 1502, 1504 and n.2 (11th Cir. 1996). The petitioner recognizes that the existence of a federal defense alone does not create jurisdiction supporting removal. Oklahoma Tax Commission v. Graham, 489 U.S. 838, 841 (1989). However, as set forth in the respondent's complaint, his asserted Eighth Amendment right to one hour of daily out of cell exercise is an essential element of his professional liability claims. Diaz, 85 F.3d at 1504. Diaz must affirmatively prove his alleged legal entitlement under the Eighth Amendment in order to be able to establish an essential element of his claims.

Consideration of the jurisdiction issue presented in this petition is particularly informed by the Court's decision in Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986). In Merrell Dow, the Court was concerned with jurisdiction on removal in a case in which a federal law standard, for which no private action could lie directly, was incorporated in a state law cause of action. Id. at 805. The court concluded that federal jurisdiction did not exist where a violation of a federal statute is an element of a state cause of action but the statute evinces no congressional intent to establish a private cause of action for violation of the statute. Id. at 817.

The standard enunciated in Merrell Dow is particularly helpful to consideration of the issue presented in

this petition. The Court noted "some combination" of a number of factors in Merrell Dow:

> (1) The plaintiffs are not part of the class for whose special benefit the statute was passed; (2) the indicia of legislative intent reveal no Congressional purpose to provide a private cause of action; (3) a federal cause of action would not further the underlying purposes of the legislative scheme; and (4) the respondent's cause of action is a subject traditionally relegated to state law.

Id. at 810-811 (footnote omitted). The application of these four factors to the present petition demonstrates the error below.

First, respondent clearly is "part of the class for whose special benefit the statute was passed." The Eighth Amendment was enacted specifically to protect the imprisoned from cruel and unusual punishment. U.S. Const. Amend. VIII.

Diaz was and is a prisoner of the Florida Department of Corrections. The litigation in Costello was wholly a federal court action to benefit the plaintiff statewide class of inmates with respect to a wide variety of prison conditions.

Second, no doubt can exist of a Congressional purpose to provide a private cause of action for violations of the Eighth Amendment and other federal provisions. See 42 U.S.C. §1983; Farmer v. Brennan, 511 U.S. 825, ___, 114 S.Ct. 1970, ___, 128 L.Ed.2d 811, 822 (1994) (citations omitted). The right of action is utterly clear.

Third, the federal cause of action for private parties under the Eighth Amendment clearly would further the underlying purposes of the Eighth Amendment. Enforcement of the Eighth Amendment is not limited to challenges to

judicial sentences in criminal cases, but rather also encompasses actions to challenge conditions of confinement not required by sentencing orders. See e.g., Farmer, 511 U.S. at ___, 114 S.Ct. at ___, 128 L.Ed.2d at 822 (collecting cases).

Fourth, the respondent's cause of action truly is one under the Eighth Amendment, not one traditionally relegated to state law. Diaz seeks to hold a private individual, the lawyer who represented the class of which he is a member, responsible for money damages for what he claims is a violation by the State of Florida of an Eighth Amendment right. Although Diaz seeks to couch his claim as one for professional liability against a lawyer, his case necessarily depends on his claim that the Eighth Amendment provides him a right to certain exercise privileges that were not provided in the

Costello settlement. As a result, this case presents the precise opposite of the circumstances raised in Merrell Dow.

This case differs from Merrell Dow in another most important respect. Diaz, as all other Florida prison inmates, was given notice of the proposed disposition of Costello and an opportunity to object, and objections of members of the plaintiff class were in fact considered by the federal district court. Celestineo, 147 F.R.D. 258, 260-261 (M.D. Fla. 1993). See Fed.R.Civ.P. 23(d)(2), (e). Even more specifically, Rule 23 permits class members "to signify whether they consider the representation fair and adequate...." Fed.R.Civ.P. 23(d)(2). Although the Federal Rules of Civil Procedure do not operate independently to extend federal jurisdiction, see Fed.R.Civ.P. 82, the importance of the prior federal court

settlement proceedings under Rule 23 cannot be minimized. The implication of Rule 23 in this case greatly "inform[s] the concern for 'practicality and necessity' that Franchise Tax Board advised for the construction of §1331 when jurisdiction is asserted because of the presence of a federal issue in a state cause of action." Merrell Dow, 478 U.S. at 811-812, quoting Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 20 (1983).

The court of appeals majority misapprehends the significance of pertinent Eighth Amendment law to the respondent's lawsuit. See Diaz, 85 F.3d at 1506 (concluding that the state of Eighth Amendment law was pertinent only to a determination of whether the petitioner's understanding of law was reasonable). On the contrary, however,

the respondent specifically claims that the Eighth Amendment requires at least one hour of daily out of cell exercise for close management inmates. Id. at 1504. Accordingly, his complaint hinges directly on the substance of the Eighth Amendment, conferring federal jurisdiction.

Furthermore, the majority below erroneously relies on the respondent's contention that expert opinions regarding inmate exercise required the Costello closure to include the exercise provisions sought by the respondent. Id. at 1506. While expert opinions may be helpful in determining whether prison conditions constitute cruel and unusual punishment, those opinions "'do not establish the constitutional minima.'" Anderson v. Coughlin, 757 F.2d 33, 35 (2d Cir. 1985), quoting Bell v. Wolfish, 441 U.S. 520, 544 n. 27 (1979).

Whether the petitioner provided deficient representation to a single member of a class composed of tens of thousands of inmates necessarily depends on construction of the Eighth Amendment. See Franchise Tax Board, 463 U.S. at 8-10. Where a complaint, on its face, shows that the right to relief under the state law sought to be used as the cause of action "requires resolution of a substantial question of federal law in dispute between the parties," the case arises under federal law for purposes of 28 U.S.C. §§ 1331 and 1441. Id. at 13.

Furthermore, because of the duties imposed upon federal district courts by Fed.R.Civ.P. 23, the adequacy of representation by class counsel is interrelated with or even subsumed in whether class members were afforded due process of law. See Zimmer Paper

Products, Inc v. Berger and Montague, P.C., 758 F.2d 86, 91 (3d Cir.), cert. denied, 474 U.S. 902 (1985). Class counsel in a statewide overall prison conditions case necessarily cannot have committed malpractice unless the settlement of the class action violated the Eighth Amendment and the requirements of Rule 23, which amount to procedures securing due process governing the district court's approval of compromise or settlement of the class action.

A dissatisfied class member may seek to intervene or may file a collateral suit (or in certain cases, opt out), but the entire inquiry into whether the dissatisfied class member states a proper claim or objection turns solely on Eighth Amendment law. If raised after court-approved settlement of a class action, the dissatisfied class member's claims must

also necessarily turn on a deprivation of the due process protections embodied within Rule 23, as well as the substance of Eighth Amendment law. Accordingly, claims such as those brought by the respondent arise under federal law.

The circuits that have addressed issues related to those raised in this petition are not in unison with one another. The Third Circuit has entertained the merits of a claim of alleged negligent failure by class counsel to give Rule 23 notice to a class member. Zimmer Paper Products, 758 F.2d at 90-94. In Zimmer, the Third Circuit reached the merits without even expressing a second thought as to whether federal subject matter jurisdiction existed in the case. The District of Columbia Circuit has enunciated dicta that it might recognize a claim against class counsel for negligent

failure to give Rule 23 notice to class members. Peters v. National R.R. Passenger Corp., 966 F.2d 1483, 1487 n.3 (D.C. Cir. 1992). As noted by the dissent below, Diaz, 85 F.3d at 1507, the Sixth Circuit has concluded otherwise and estopped claims against counsel following settlement proceedings that complied with Rule 23.

> Since appellants had the opportunity to object to the legal representation at the prior settlement hearing and since a finding that the class was adequately represented is necessary for finding the settlement was fair and reasonable, which in turn was essential to approving the settlement, appellants are collaterally estopped from now asserting that the legal representation was not adequate and that the U.A.W. committed malpractice. Laskey v. U.A.W., 638 F.2d 954, 957 (6th Cir. 1981).

The Tenth and Eleventh Circuits additionally have indicated that

individual class members dissatisfied with a proposed order in a class action or with actions of class counsel are necessarily limited in their recourse to the avenues provided by Rule 23. McNeil v. Guthrie, 945 F.2d 1163, 1167 (10th Cir. 1991); Guthrie v. Evans, 815 F.2d 626, 628 (11th Cir. 1987). Otherwise, class counsel is subject to abuse by separate civil lawsuits brought by innumerable thousands of class members. See McNeil v. Guthrie, 945 F.2d at 1167. As the Fifth Circuit has explained,

> It is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement

> is a matter equally comprised of conjecture and irrelevance.

Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Anti-Trust Litigation), 643 F.2d 195, 212 (5th Cir. 1981). As argued in the dissent below, recognition of a legal malpractice action against class counsel following a settlement approved by a federal district court under Fed.R.Civ.P. 23 would yield an intolerable amalgam of results. Diaz, F.3d at 1508 (Logan, J., dissenting). "Despite the general rule that Federal Rules of Procedure do not create causes of action, clearly whether a class member may sue class counsel for malpractice arising out of a federal court-approved settlement is a federal question." Id. at 1507 (Logan, J., dissenting).

Subsumed within the questions presented here is the scope of the duty

owed by class counsel to individual members of the class, itself a federal question as to the meaning of the typicality and adequacy of representation provisions of Fed.R.Civ.P. 23. As a matter of federal law, construing Rule 23, the very nature of a class action renders class counsel's duty to be to the class as a whole, not to individual dissatisfied class members. Parker v. Anderson, 667 F.2d 1204, 1211 (5th Cir. 1982); Kincade v. General Tire and Rubber Co., 635 F.2d 501, 508 (5th Cir. 1981); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1176, 1216 (5th Cir. 1978). A contrary result would eviscerate the very purposes of Rule 23 and render class counsel worse than foolhardy to undertake representation of a class of any size. Even more acutely, the result reached by the majority in the court of appeals would

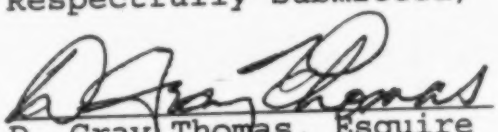
result in a total absence of competent counsel willing to undertake court-appointed representation of an indigent class.

The Court's review is warranted because the respondent's right to relief in his professional liability lawsuit against class counsel, the petitioner, depends necessarily on resolution of the state of Eighth Amendment law. The important questions presented are unresolved and recurring, and the court of appeals' majority opinion conflicts with the standard for removal enunciated in prior decisions of this Court. The Court should grant review to consider and resolve the important questions presented, regarding which the circuits conflict, and correct the erroneous result reached by the court of appeals below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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December 20, 1996

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Enrique DIAZ, Plaintiff-Appellant,

v.

William J. SHEPPARD, Defendant-Appellee.

No. 94-3308

United States Court of Appeals,
Eleventh Circuit

June 25, 1996

Before EDMONDSON and DUBINA, Circuit Judges, and LOGAN* Senior Circuit Judge.

EDMONDSON, Circuit Judge:

This appeal is about a lawyer's professional responsibility and about federal jurisdiction. Plaintiff Enrique Diaz, a Florida prisoner, appeals the district court's denial of his motion for remand to state court and dismissal of his case for failure to state a claim.

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* Honorable James K. Logan, Senior U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

Because the federal court lacked jurisdiction to hear this case, we reverse and remand with instructions to the district court to remand this case to state court.

Background

For the facts we look to the complaint's allegations. Diaz was a member of the class in a class action suit filed by inmates of the Florida Department of Corrections ("DOC") in the United States District Court for the Middle District of Florida challenging the DOC's physical and mental health care delivery system. The case was known as Celestineo and Costello v. Singletary, 147 F.R.D. 258 (M.D. Fla. 1993) ("Costello"). The class was represented by Defendant William

Sheppard.[1]

In 1984, the Costello court ordered a committee of doctors and experts to review DOC's health care system. The committee filed an "Interim Medical Team Report" recommending that all DOC inmates receive at least one hour per day of large muscle exercise outside of their cells. Three months later, the DOC decreased the amount of yard time for those on close management ("CM") from four hours to two hours per week.

In 1992, the Costello court issued a

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[1] Diaz is on close management ("CM"), that is, long term, single-cell confinement apart from the general population. He receives a maximum of two hours of outdoor exercise per week. CM inmates are often denied all outdoor exercise when placed on the Yard Suspension List (YSL). The amount of outdoor exercise was an issue in the Costello suit. Before the Costello suit was initiated, CM inmates were entitled to receive four hours of outdoor exercise per week.

notice of proposed stipulated final judgment which proposed closing the case based on findings that the DOC had a constitutionally adequate system of delivery physical and mental health care. The court ordered notification of the proposed judgement to class members and established a time for class members to file comments or objections. Diaz wrote Sheppard a letter "begging" him not to agree to the proposed final judgement because it did not provide for one hour of outdoor exercise per day; nor did it prevent CM inmates from being placed on the Yard Suspension List ("YSL"). Sheppard, however, did not contest the lack of outdoor exercise. After reviewing the objections during a hearing, the district court entered a final judgment closing the Costello case.

In 1994, Diaz sued Sheppard in

Florida state court alleging (1) legal malpractice, (2) negligence, and (3) breach of contract. Diaz claims that in agreeing to the stipulated final judgment upholding just two hours per week of CM out-of-cell exercise, Sheppard, in effect, negligently settled too cheaply. Diaz says Sheppard ignored (1) a "large body of case law" that requires prison administrators to provide all CM inmates with at least one hour of out-of-cell exercise per day: a mistake about the legal strength of the prisoners' claim and (2) the opinions in the Costello case of the district court's "own appointed medical experts:" a mistake about the evidentiary strength of the prisoners' claim.

Sheppard's motion to remove Diaz's case to federal court pursuant to 28 U.S.C. § 1441, on the ground that the

district court had original jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. §1331, was granted. Sheppard then moved to dismiss Diaz's complaint under Rule 12(b)(6) for failure to state a claim. Diaz moved to remand the case to state court. The district court, stating that Diaz would have to establish the relief he seeks is required by the United States Constitution, denied the motion to remand. The district court then granted Sheppard's motion to dismiss on the ground that class counsel owes no duty to individual class members.

Discussion

Sheppard claims that jurisdiction is proper in the district court because Diaz is attempting to relitigate matters determined in Costello. Sheppard claims that Diaz had the opportunity to object to

the proposed final judgment in Costello and that the malpractice action is just an untimely objection to the settlement in Costello.[2] In addition, Sheppard says this case arises under federal law because resolution of Diaz's claims necessarily turns on the construction of federal law, that is, the Eighth Amendment to the United States Constitution. See Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 8-10, 103 S.Ct. 2841, 2846, 77 L.Ed.2d 420 (1983).

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[2] Res judicata, collateral estoppel and estoppel defenses are affirmative defenses in both Florida and federal courts. See Palmer v. McCallion, 645 So.2d 131, 133 (Fla. Dist. Ct. App. 1994); Troxler v. Owens-Illinois, Inc., 717 F.2d 530, 533 n.2 (11th Cir. 1983). These potential defenses have no impact on the question of whether the action set out in the complaint arises from federal law for jurisdictional purposes. See Caterpillar, Inc. v. Williams, 482 U.S. 386, 393-94, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987) (case may not be removed on the basis of a federal defense).

Diaz says he is seeking not outdoor exercise or declaration of some constitutional right, but only money damages for Sheppard's malpractice. Diaz contends that even if a court must, in deciding a case, interpret federal law, that fact does not necessarily mean the claim is sufficient to confer federal jurisdiction. See generally Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 813-14 & n. 11, 106 S.Ct. 3229, 3234-35 & n. 11, 92 L.Ed.2d 650 (1986). Then Diaz stresses that, to the extent federal law is mentioned in his complaint, it is only to point out a way that Sheppard neglected his legal duty of care (an essential element of Diaz's state law malpractice claim): to establish that the federal law at issue in Costello - exercise requirements under the Eighth Amendment - was settled, was favorable to

prisoners like Diaz, and should have been known by Sheppard.

Diaz basically argues that no interpretation of federal law is necessary to adjudicate his state law claims: the fundamental legal standards are substantially undisputed. He says that, in light of well-settled federal case law, Sheppard ignored the Costello court's appointed experts who recommended one hour of exercise per day. Briefly stated, Diaz charges that Sheppard unreasonably underestimated the strength of the prisoners' case and, as a result, stipulated to a judgment that was too unfavorable.

On a motion to remand, the removing party bears the burden of establishing jurisdiction. See Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1356 (11th Cir. 1996). The removal statute should be

construed narrowly with doubt construed against removal. See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 107-09, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941). We look at the complaint. As a general rule, a case arises under federal law only if it is federal law that creates the cause of action. See Franchise Tax Board, 463 U.S. at 8-19, 103 S.Ct. at 2846. The case, however, may arise under federal law "if a well-pleaded complaint established that [the] right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." Id. at 13, 103 S.Ct. at 2848. But, the "mere presence of a federal issues in a state cause of action does not automatically confer federal-question jurisdiction." Merrell Dow, 478 U.S. at 813, 106 S.Ct. at 3234. See also Moore v. Chesapeake & Ohio Ry. Co., 291

U.S 205, 212-15, 54 S.Ct. 402, 405-06, 78 L.Ed. 755 (1934) (that part of a statutory scheme requires some analysis of federal law is insufficient to invoke federal jurisdiction).[3]

The district court erred in denying Diaz's motion to remand. The nature of

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[3] The Costello litigation was a class action suit certified under Federal Rule of Civil Procedure 23. We note that the Federal Rules of Civil Procedure do not create an independent basis for federal subject matter jurisdiction. See Fed.R.Civ.P. 82. See also Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 70 (2nd Cir. 1990) (Federal Rules do not create independent basis for federal question jurisdiction); Pineville Real Estate Operation Corp. v. Michael, 32 F.3d 88, 90 (4th Cir. 1994) (same). Diaz does not allege that his lawyer's error was one of failing to comply with the mechanisms set out in Rule 23 or some other rule of federal procedure. Cf. Zimmer Paper Products, Inc. v. Berger and Montague, P.C., 758 F.2d 86 (3d Cir. 1985) (considering, without discussing basis for federal subject matter jurisdiction, whether class counsel breached duty, not by misunderstanding substantive issues about the merits, but by failing to follow procedures of Rule 23 in class action).

Diaz's complaint is that Sheppard is guilty of malpractice, negligence and breach of contract under Florida law. (We do not hint that Diaz's claim has merit or even that he has stated a claim upon which relief can be granted under Florida law). No substantial question of federal law must be answered to determine plaintiff's claims, and federal jurisdiction is lacking. See Ray v. Tennessee Valley Authority, 677 F.2d 818, 825-26 (11th Cir. 1982) (holding, pre-Franchise Tax Board, that district court had no federal jurisdiction to hear malpractice case arising from defendant attorney's representation, per appointment by court, of plaintiff in 42 U.S.C. § 1983 action).

Whether Sheppard in Costello misread or disregarded federal law in such an unreasonable way so as to constitute legal malpractice in Florida is ultimately a

question of state law. In the complaint, the Eighth Amendment is mentioned only to support an element of Diaz's state law claim. Cf. Hill v. Marston, 13 F.3d 1548, 1559 (11th Cir. 1994) (complaint alleging violations by defendant lawyer of state securities registration statutes did not arise under federal law for purposes of federal question jurisdiction, even though elements of state law claim included alleged knowledge of, and failure to comply with, federal securities laws); Berg v. Leason, 32 F.3d 422, 426 (9th Cir. 1994) (malicious prosecution action does not arise under federal law because one element requires proof that underlying federal action was legally untenable).

If the pertinent Eighth Amendment law was debatable, to decide whether Sheppard's understanding of the applicable law in Costello was within the range of

the reasonable will require no precise determination of what the pertinent federal law was in reality; so no substantial question of federal law needs to be decided. If the pertinent Eighth Amendment law truly was clearly settled before the stipulated judgment was entered in Costello, no substantial question of federal law is presented: the question has already been answered. We have no doubt that a state court can, if need be, resolve matters of federal constitutional law to the point necessary to determine whether Sheppard's understanding of the law was reasonable.

More important, because Diaz contends that Sheppard wrongfully ignored the opinion evidence of the court-appointed experts, the professional responsibility claims in the complaint do not hinge on the substance of the Eighth Amendment

(whatever it may be exactly and about which there may be no controversy). Instead, they hinge on his lawyer's alleged negligence in evaluating the prisoners' case and in basically agreeing to an inadequate settlement given all the circumstances in the Costello case - including the expert opinions supporting the need for more exercise and the status, in fact, of the law (uncertain or debatable or settled) at the time.[4] See

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[4] For a case describing a court's decree as more analogous to a settlement, see Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1168-75 (5th Cir. 1978). By the way, whether the stipulated final judgment in Costello is in the nature of a consent settlement or the Costello court's own judgment is not, itself, a substantial federal question that might give the district court jurisdiction. (No one has made this argument anyway). The core allegation advanced in the pro se complaint is that Sheppard agreed to (or perhaps acquiesced in) the judgment because he negligently failed to evaluate properly and to pursue the prisoners' exercise claim. In either event, the cause of action arises from

Hudson Ins. Co. v. American Elec. Corp., 957 F.2d 826, 829 (11th Cir. 1992) (no federal jurisdiction in declaratory judgment action to determine insurer's liability because right to relief did not depend on resolution of CERCLA).

The district court lacked subject-matter jurisdiction over Diaz's complaint.[5] We vacate and remand to the

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state law.

[5] We have read the dissent and personally would not be sorry if the law compelled the result Judge Logan advocates for this case. But, we think the cases he cites - none of which we contend reached the wrong result - are too different from this case to be of much help. Most important, none involve the removal from state court of a case in which a complaint for legal malpractice has been plead invoking state law. See Laskey v. UAW, 638 F.2d 954 (6th Cir. 1981) (direct appeal by class of summary judgment granted to defendants in federal class action); McNeil v. Guthrie, 945 F.2d 1163 (10th Cir. 1991) (mandamus action to require clerk of federal court file pro se papers to enforce consent decree in federal class action); Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987) (attempted

district court with instructions to remand the case to state court.

VACATED AND REMANDED.

LOGAN, Senior Circuit Judge, dissenting:

If I could view this as simply a case of a client suing his lawyer, a resident of the same state, for malpractice I would concur in the majority opinion. But the malpractice action here is by a member of a class certified under Federal Rule of Civil Procedure 23 in a federal court suit

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pro se direct appeal by unnamed class member of settled federal class action); Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Ligation), 643 F.2d 195 (5th Cir. 1981) (direct appeal by objectors to settlements in federal class action). And we are unprepared to declare as a matter of law that counsel in a class action suit has no professional obligations except those set out by Rule 23. None of the cases cited to us has gone that far.

We do also stress that we do not today hold Mr. Sheppard liable for malpractice.

alleging unconstitutional prison conditions; the alleged malpractice is that class counsel did not secure more out-of-cell exercise time in negotiating a settlement approved by the district court.

Only one court has held that a Rule 23 class member can bring a malpractice action against class counsel Zimmer Paper Products, Inc. v. Berger and Montague, P.C., 758 F.2d 86 (3d Cir.), cert. denied, 474 U.S. 902, 106 S.Ct. 228, 88 L.Ed.2d 227 (1985). That case involved an alleged negligent failure to give notice to a class member; the court denied relief after finding that counsel had complied with court orders. In dicta, the D.C. Circuit has indicated that it might recognize such a claim, citing Zimmer Paper Products. Peters v. National R.R. Passenger Corp., 966 F.2d 1483, 1487 n. 3 (D.C. Cir. 1992). No case, however, has

ever held class counsel liable for malpractice. See Susan V. Koniak, Through the Looking Glass of Ethics and the Wrong with Rights We Find There, 9 Geo. J. Legal Ethics 1,14 (1995) (hereinafter Koniak).

In contrast, Laskey v. UAW, 638 F.2d 954 (6th Cir. 1981), rejected a legal malpractice claims against the UAW, which represented plaintiffs in a federal class action, in the following words:

> Since appellants had the opportunity to object to the legal representation at the prior settlement hearing and since a finding that the class was adequately represented is necessary for finding the settlement was fair and reasonable, which in turn was essential to approving the settlement, appellants are collaterally estopped from now asserting that the legal representation was not adequate and that the UAW committed legal malpractice.

Id. at 957 (citation omitted). In McNeil v. Guthrie, 945 F.2d 1163 (10th Cir.

1991), the court held that a plaintiff prisoner dissatisfied with actions of class counsel has two options: "to seek to intervene in the class action" or to "file a collateral suit alleging that class counsel is not adequately representing the class." Id. at 1167. These were regarded as the only available remedies because of the potential for abuse of class counsel. "Class counsel is entitled to be free from harassment by class members." Id.

Although no Eleventh Circuit cases have involved a suit against class counsel, Eleventh Circuit precedent is consistent with NcNeil. In fact, McNeil cited Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987), in which a dissatisfied class member sought to appeal a district court's judgment in a prison conditions class action. The court ruled that the class

member lacked standing, stating that "[t]he procedures for class actions are carefully set forth in Fed.R.Civ.P. 23." Id. at 628. It held the class member (who could not opt out of the class) had only two available avenues of relief: a motion to intervene or a collateral proceeding to challenge the adequacy of the representation. Nonrecognition of a malpractice action against class counsel would also seem compelled by the following oft-cited comments of the Fifth Circuit, binding in the Eleventh Circuit, in Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litigation), 643 F.2d 195, 212 (5th Cir. 1981):

> It is, ultimately, in the settlement terms that the class representatives' judgment and the adequacy of their representation is either vindicated or found wanting. If the terms themselves are fair,

> reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel; in such cases, whether another team of negotiators might have accomplished a better settlement is a matter equally comprised of conjecture and irrelevance.

Despite the general rule that federal rules of procedure do not create causes of action, clearly whether a class member may sue class counsel for malpractice arising out of a federal court-approved settlement is a federal question. The one court that has explicitly recognized the possibility of a malpractice suit against class counsel indicates that "the bounds of a class counsel's fiduciary duty with respect to notice are determined in large part by due process and Rule 23 requirements." Zimmer Paper Products, 758 F.2d at 91. One commentator who favors such an action states that "the class action court's responsibility under

Federal Rule of Civil Procedure 23 to assess the adequacy of class counsel makes it unlikely that the court will use malpractice actions as a means of enforcing class counsel's obligations." Koniak at 15. In arguing for recognition that author indicates a malpractice action must be based upon an interpretation of the requirements of Rule 23. Id. Thus, if the courts are to recognize the existence of a malpractice action on behalf of class members against class counsel, it must be grounded on federal law. The federal courts administering Rule 23 class actions could not tolerate different views on recognition of such an action from different state courts.

Thus, I would hold that the complaint in the instant case is a claim derived from federal law and that the case was properly removed to federal court. I

would affirm the district court's dismissal of the action for the reason that we would not recognize a malpractice claim against class counsel.

For these reasons I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-3308

ENRIQUE DIAZ,

Plaintiff-Appellant,

versus

WILLIAM J. SHEPPARD,

Defendant-Appellee.

On Appeal from the United States
District Court for the Middle District
of Florida

BEFORE: EDMONDSON and DUBINA, Circuit Judges, and LOGAN*, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by the Appellee, William J. Sheppard, is denied.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

*Honorable James K. Logan, Senior U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-3308

ENRIQUE DIAZ,

Plaintiff-Appellant,

versus

WILLIAM J. SHEPPARD,

Defendant-Appellee.

On Appeal from the United States
District Court for the Middle District
of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, _____ F.2d _____).

BEFORE: EDMONDSON and DUBINA, Circuit Judges, and LOGAN*, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

*Honorable James K. Logan, Senior U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-3308

ENRIQUE DIAZ,

Plaintiff-Appellant,

versus

WILLIAM J. SHEPPARD,

Defendant-Appellee.

Appeal from the United States
District Court for the Middle District
of Florida

Before EDMONDSON and DUBINA, Circuit Judges, and LOGAN*, Senior Circuit Judge.

JUDGMENT

This cause came to heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court

appealed from in this cause be and the same is hereby VACATED; and that this cause be and the same is hereby REMANDED to said District Court with instructions in accordance with the opinion of this Court.

LOGAN, Senior Circuit Judge, dissented and filed an opinion.

*Honorable James K. Logan, Senior U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

Entered: June 25, 1996
For the Court: Miguel J. Cortez, Clerk
By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATED: 10/10/96

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ENRIQUE J. DIAZ and
WAYNE L. JOHNSON,

Plaintiffs,

v. Case No. 94-756-Civ-J-20

WILLIAM J. SHEPPARD,

Defendant.

O R D E R

Before the Court is Defendant's Motion to Dismiss (Doc. No. 6, filed August 23, 1994) and Plaintiff's Motion to Remand (Doc. No. 10, filed August 31, 1994).

This case was initiated in the state court based on the alleged malpractice of counsel appointed by the Court to represent a class of prisoners in the case of Costello v. Singletary, a Civil Rights case based on the conditions in Florida's

prison system. Plaintiffs were members of the represented class. Defendant sought to have this case removed because the underlying cause of action was based on the denial of several constitutional rights. In order to prevail in this case, plaintiffs would necessarily be required to establish that the relief they now seek is required by the Constitution. Therefore, the case is properly before the federal court and the Motion to Remand (Doc. No. 10) is **DENIED.**

Plaintiffs' claims, although stated in different terms in each of the counts of the complaint, are based on the alleged malpractice of Defendant in his handling of the underlying class action. Thus, the question presented by the Complaint is whether Defendant owed a duty to Plaintiffs which he breached by failing to fully represent their interests. It has

been stated in several cases, and this Court agrees, that counsel in a class action owes a duty to the class as a whole, not to the individual class members. Parker v. Anderson, 667 F.2d 1204 (5th Cir. 1982); Pettway v. American Cast Iron Pipe Company, 576 F.2d 1157 (5th Cir. 1978). The general duty owed by class counsel to the class as a whole is insufficient, as a matter of law, to support an action by individual class members for alleged legal malpractice. Plaintiffs' current complaint would have been more properly raised as an objection to the proposed resolution of the underlying class action or in individual lawsuits as provided by Fed.R.Civ.P. 23(c)(2).

Accordingly, Defendant's Motion to Dismiss (Doc. No. 6) is **GRANTED**. Plaintiffs' complaint is **DISMISSED WITH PREJUDICE**.

The Clerk is directed to close the file.

DONE AND ORDERED at Jacksonville this 6th day of October, 1994.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States District Judge

Copies to:

William J. Sheppard, Esq.
Enrique Diaz
Wayne L. Johnson

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MICHAEL J. COSTELLO, et al.,

Plaintiffs,

v. NO. 72-109-Civ-J-S
NO. 72-94-Civ-J-S

LOUIE L. WAINWRIGHT, et al.,

Defendants.

UNITED STATES OF AMERICA

Amicus Curiae.

O R D E R

These consolidated cases, challenging various conditions of prison confinement within the Florida prison system, were filed in 1972. Shortly thereafter, the plaintiff class, consisting of all inmates who are presently or who will hereafter be in the custody of the Florida Department of Corrections, were granted leave to proceed in forma pauperis.

On October 11, 1972, the Court appointed Tobias Simon, Esquire, to represent plaintiffs. Mr. Simon, always a champion of individual rights, served faithfully as counsel for plaintiffs for many years. Due in large part to Mr. Simon's diligence, dedication and fine legal skills, the parties reached settlement agreements on all major issues in this complex, consequential litigation.

It was with deep regret that this Court recently learned of Mr. Simon's death from cancer. His death constitutes a great loss not only to the legal profession but to every American citizen who values the foundations of liberty and individual freedom upon which this country was built.

In recent years, Mr. Simon has been assisted in this litigation by an associate in his law firm, Ms. Sharon B.

Jacobs. On May 7, 1982, the Court received a letter from Ms. Jacobs indicating her desire to maintain an active role in this litigation, but also requesting that the Court appoint Mr. William J. Sheppard to assist her. It would be difficult to find a more able attorney to fill the void left by Mr. Simon's death than William J. Sheppard. Mr. Sheppard has been before this Court on numerous occasions in other civil rights cases and has always rendered representation of the highest quality.

Accordingly, it is so

ORDERED:

1. Ms. Sharon B. Jacobs shall continue as court-appointed counsel in this cause, as successor to Mr. Tobias Simon.

2. Mr. William J. Sheppard is hereby appointed as co-counsel in this cause.

DONE and ORDERED at Jacksonville, Florida, this 10th day of May, 1982.

/s/ Charles R. Scott
Senior United States District Judge

Copies:

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Honorable Jim Smith
Attorney General
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Stephen Whinston, Esquire
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Washington, D.C. 20630

STATUTORY AND RULE PROVISIONS INVOLVED

This case requires interpretation and application of 28 U.S.C. §§1441 and 1331, and of Fed.R.Civ.P. 23(d) and (e).

> **§1441. Actions Removable Generally.**
>
> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the District Court of the United States for the district and division embracing the place where such action is pending....
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties....

In full, 28 U.S.C. §1331, provides:

§1331. Federal Question.

The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Fed.R.Civ.P. 23(d) and (e) provide:

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent

persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.